But, aside from these considerations, the evidence fully sustains the judgment of the commission in that regard.

It follows that the order complained of is without error, and must be affirmed. *Affirmed.*

SPANGLER V. BOOZE.

Supreme Court of Appeals of Virginia.

December 1, 1904.

[49 S. E. 42.]

MALICIOUS ISSUANCE OF SEARCH WARRANT—PROBABLE CAUSE—DECLARATION—TERMINATION OF PROSECUTION.

1. An action will lie for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen.
2. Where the execution of a search warrant was ineffective in disclosing any of the property alleged to have been stolen, and the proceeding was thereupon discontinued, the declaration in an action for the malicious issuance and execution of such warrant without probable cause was not demurrable for failure to allege that plaintiff had been tried on the merits by a court of competent jurisdiction and acquitted.

Error to Circuit Court, Botetourt county.

Action by Uriah Spangler against A. T. Booze. A judgment was rendered in favor of defendant, and plaintiff brings error.

Reversed.

Benjamin Haden, for plaintiff in error.

Glasgow & Woodson, for defendant in error.

HARRISON, J.

This action of trespass on the case was brought by the plaintiff in error to recover of the defendant in error damages for having maliciously and without probable cause procured the issuance and execution of a search warrant, charging the plaintiff in error with the theft of certain apples.

A demurrer to the declaration was sustained by the circuit court, and from that judgment a writ of error was awarded, bringing the case here for review.

The declaration is in the usual form, its salient averments being that the defendant, A. T. Booze, contriving and maliciously in-

tending to injure the plaintiff, Uriah Spangler, in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, had appeared before a justice of the peace, and without any reasonable or probable cause made complaint that the plaintiff did unlawfully steal, take, and carry away one lot of apples of the value of $20, the property of the defendant, and that he had probable cause to believe, and did verily believe, that the property so carried away was concealed in the dwelling house of the plaintiff; that upon such complaint the defendant had, without any reasonable or probable cause whatever, procured the justice to make and grant his certain warrant, under his hand and seal, authorizing and empowering a constable forthwith in day or night time to enter the dwelling house of plaintiff, and there diligently search for the property alleged to have been stolen, and that, if the same or any part thereof should be found upon such search, the constable should bring such property and also the body of the plaintiff before some justice of the county, to be disposed of and dealt with according to law; that by virtue and under color of this warrant the constable to whom it was directed, and who was thereby charged with its execution, had, without any reasonable or probable cause whatsoever, and without the leave or license and against the will of the plaintiff, entered his dwelling house, and searched and ransacked the same and the rooms and apartments thereof, and had flung, tossed, and tumbled the furniture, wearing apparel, and other contents thereof, and had thereby greatly disturbed and disquieted the plaintiff and his family in the possession of said house. It is further averred that neither the apples of the defendant, alleged to have been stolen, nor any other goods or chattels of the defendant, feloniously stolen, were found in the plaintiff's house; nor were there any such goods and chattels therein before, at the time of the complaint, or at any other time whatever; and that the defendant had no reasonable or probable cause for making the complaint or causing the warrant to be issued or executed; and that the defendant did not further prosecute his charge, but deserted and abandoned the same, and the complaint was wholly ended and determined.

The ground of demurrer to this declaration is that it fails to allege that the charges contained in the warrant therein referred to were, or any of them ever was, tried on their merits by a court

having jurisdiction thereof, and that the plaintiff was adjudged innocent thereof, and that the same terminated favorably to him. The averments of the declaration show that these allegations were not in accordance with the facts, and therefore could not be made. This brings us to a consideration of the question whether it was necessary for the plaintiff to make the averments suggested by the demurrer in order to maintain his action.

It is well settled by authority, both in this country and in England, that an action for damages will lie for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen. Wharton on Crim. Law (7th ed.) vol. 3, sec. 2942; *Elsee* v. *Smith,* 16 Eng. Com. L. Rep. 19; *Cooper* v. *Booth,* 3 Esp. Rep. 135; *Miller* v. *Brown,* 3 Mo. 127, 23 Am. Dec. 693; *Carey* v. *Sheets,* 67 Ind. 375; 4 Minor, part 1, p. 393.

Mr. Minor says that "maliciously obtaining a search warrant to search one's house for goods alleged to be stolen, smuggled, etc., is such a prosecution that an action lies for it."

The contention of defendant in error that in a case like this the plaintiff must aver that he has been tried before a court of competent jurisdiction, and been fully acquitted on the merits, of the crime with which he is charged, is not tenable. When the stolen goods are not found upon the execution of a search warrant, that prosecution is ended. The warrant has served its purpose, and falls to the ground. It is, upon its face, conditioned upon the goods alleged to have been stolen being found. Not being found, as in the case at bar, the prosecution inaugurated by the defendant ended, and no further proceedings could be had thereunder.

Judge Cooley, upon this subject, says: "The reasonable rule seems to be that the technical prerequisite is only that the particular prosecution be disposed of in such manner that this cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one." Cooley on Torts, p. 216.

In the leading case of *Miller* v. *Brown, supra*—a very similar case to that at bar—it is said: "This action is to redress any damages the plaintiff may have sustained either in his reputation by the scandal, in his person by imprisonment, or in his property by expense incurred; and it would have well lain upon the mere affidavit of the defendant, if made with malice and without probable cause;

for assuredly an application for a search warrant upon the ground that goods have been stolen and are concealed within a person's inclosure, is a sufficient scandal to the reputation to sustain an action as to this ground. The cases of *Elsee* v. *Smith,* 16 Eng. Com. Law Rep. Cond. 212, and *Boot* v. *Cooper,* 3 Esp. 144, T. R. 535, and *Bell* v. *Clapp,* 10 Johns. 263, 6 Am. Dec. 339, sustain fully this position."

In the case of *Olson* v. *Tvete,* 46 Minn. 225, 48 N. W. 918, where the goods were not found, the court held an action for damages would lie for maliciously and without probable cause procuring the issuance and execution of a search warrant for goods alleged to have been stolen; the court saying "that such a proceeding not only involves an imputation of criminal conduct on the part of the person whose premises are thus subjected to search, but it contemplates the arrest of the person if, upon search, the property is found in his possession. Such is the direction in the search warrant."

In the case of *Whitson* v. *May,* 71 Ind. 269, where no goods were found, it was contended that the issuance and service of a search warrant was not a "prosecution" in the sense in which that word was used by the text-writers and the authorities in treating upon actions for malicious prosecutions, and that, consequently, an action would not lie for causing a search warrant to be issued, conceding that the motive may have been malicious, and that no probable cause existed. But the court disregarded this contention, and overruled the demurrer to the complaint, holding that an action for malicious prosecution did lie against one who maliciously, and without probable cause, institutes and carries forward proceedings under a search warrant.

A learned author, speaking of search warrants, has remarked that "there is not a description of process known to the law the execution of which is more distressing to the citizen. Perhaps there is none which exerts such intense feeling in consequence of its humiliating and degrading effects." Archbold's Cr. Pr. & Pl., vol. 1, p. 131.

It would be a reproach to our jurisprudence if such a prosecution could be inaugurated and carried forward maliciously and without probable cause, and the innocent victim have no remedy. We are of opinion that the declaration in judgment states a good

cause of action, and that the plaintiff was entitled to a trial on the merits of his case.

For these reasons the judgment complained of must be reversed, and the case remanded for further proceedings. *Reversed.*

NOTE.—In the case of *Ward* v. *Reasor*, 98 Va. 399, the court sustained a demurrer to the declaration because it alleged that the magistrate before whom the accused was brought for trial, dismissed the proceedings "without hearing and evidence," though there were the usual allegations of malice, want of probable cause, and termination of the prosecution favorable to the accused. The court held this action of the magistrate to be tantamount to the entry of a *nolle prosequi*, and said that where a prosecution is so ended no action for malicious prosecution can be maintained therefor.

In editorials in 6 Va. Law Reg. 357, and 7 Va. Law Reg. 276, Prof. Lile ably criticises this opinion. In part he says:

"When one considers the practical effect of such a rule of law, he may well doubt its soundness in reason, and may well question any supposed authority upon which it rests. It means that the more malicious and inexcusable the charge preferred, the more secure from an action for damages is the person who prefers it. If the accusation have enough of apparent foundation to warrant the prosecuting attorney in pressing it to trial and to a conclusion, the accused person, if acquitted of the charge, may maintain an action against his accuser, on proof of malice and want of probable cause; but if the charge be so palpably without foundation that the public prosecutor abandons the prosecution and enters a *nolle prosequi*, the law affords no redress for the outrage thus perpetrated upon the accused. Under this rule of law, an innocent citizen who has been arrested on a serious charge, on a warrant sworn out from purely malicious motives and without probable cause, and who has been led, it may be, handcuffed through the public streets to prison, where he may have languished as the companion of thieves, is denied redress, unless the public prosecutor, over whom he has no control, regards the evidence against him strong enough to justify a prosecution of the charge to a conclusion. If the charge be so transparently malicious as to necessitate the entry of a *nolle prosequi*, the accused is without civil redress."

And again, p. 359: "The purpose of requiring an allegation and proof of the termination of the prosecution is to avoid the litigation of the same thing at the same time in separate proceedings. So long as the criminal action is pending, the innocence of the accused cannot be litigated in the civil action since the accused may eventually be found guilty in the criminal proceeding; and, if guilty, no civil action can be maintained. This being the reason for allegation and proof of the finality of the prosecution, *it follows that the manner of its ending is immaterial, provided it be finally terminated in favor of the prisoner.*"

A malicious prosecution is regarded as a personal tort. The term is not limited to the institution of criminal proceedings, but includes civil suits as well. The rule of the English court is that no action will lie for malicious prosecution of a civil suit, unless there be an arrest of the prisoner, or seizure of the property of the defendant in the original action The American rule, however, is to the contrary. See cases cited, 8 Va. Law Reg 381.

See *Stewart* v. *Sonneborne*, 98 U S. 187, 25 Law Ed. 116, cases cited and note; Rose's Notes to same; and an exhaustive note on the subject appended to *Ross* v. *Hixon*, 26 Am St. Rep. 123. G. C. G.